IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

SA.No. 349 of 1994()

AS.197/1992 of DISTRICT COURT, THALASSERY
OS.72/1988 of PRL.S.C.,THALASSERY
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APPELLANTS-APPELLANTS IN APPEAL & DEFENDANTS 1 TO 3 IN THE SUIT
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1. **ECONOMIC TRANSPORT ORGANISATION, HEAD OFFICE, P3, NEW C.I.T. ROAD, CALCUTTA – 73.**

2. **ECONOMIC TRANSPORT ORGANISATION, ECONOMIC HOUSE, 133/300, TRANSPORT NAGAR, KANPUR.**

3. **ECONOMIC TRANSPORT ORGANISATION, CUSTOMS ROAD, TELLICHERRY, REP. NY POWER OF ATTORNEY HOLDER SRI. I. VENUGOPAL.**

BY ADV. SRI.A.K.SRINIVASAN
SRI.N.S.MOHAMED USMAN
SRI.A.S.BENOY

RESPONDENTS: RESPONDENTS IN APPEAL & PLAINTIFF & 4TH DEFENDANT IN THE SUIT:
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1. **M/S. NATIONAL INSURANCE CO.LTD., REPRESENTED BY ITS DIVISIONAL MANAGER, DIVISIONAL OFFICE, MANUAL SONS TOWERS, 2ND FLOOR, GENERAL HOSPITAL ROAD, CALICUT.**

*2. **M/S. ELITE TRADING COMPANY, THALASSERY – REMOVED**

***THE NAME OF THE 2ND RESPONDENT IS REMOVED FROM THE PARTY ARRAY AT THE RISK OF THE PETITIONERS AS PER ORDER DTD. 6/10/06 IN I.A.1070/06.**

R1 (BY ADV. SRI.M.RAMESH CHANDER
(SRI.V.RAJAGOPAL
(SRI.M.S.MANIKANTAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.657/1994 IN S.A.NO.349/1994

DISMISSED

22/11/2007 **SD/- M.SASIDHARAN NAMBIAR,JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 349 OF 1994

Dated 22nd November 2007

J U D G M E N T

Defendants 1 to 3 in O.S.72/1988 on the file of Sub court, Thalassery are appellants. Plaintiff is the respondent. First respondent instituted the suit for realisation of the value of goods not delivered by appellants. Admittedly, second respondent fourth defendant had taken up a Marine Cargo Inland Transit Insurance Policy from first respondent. A consignment of 20 bags of Supari was admittedly despatched by second respondent under Ext.A2 lorry receipt from Thalassery to Kanpur. Total value of consignment was Rs.24,284/-. The consignment was despatched on 26/12/1984. According to first respondent as per letter second appellant informed second respondent on 28/1/1985 that out of twenty bag of Supari fifteen bags were burned and damaged while being carried from Nagpur to Kanpur. But 10 bags of Supari were delivered to the consignee on 25/2/1985. Suit is for the value of the remaining 10 bags of Suprari which

was not delivered. The suit was instituted by first respondent based on Ext.A13 marine insurance policy and under Exts.A11 and A12 Special power of attorney and letter of subrogation executed by second respondent in favour of first respondent. Suit was resisted by appellants contending that the suit is barred by limitation. It was admitted that consignment was insured with first respondent. It was contended that goods were damaged due to a fire caused to the lorry and it was not due to the fault or negligence of appellants and the damage was caused in spite of the due care and caution taken by the appellants and result of the unfortunate accident and 10 bags of consignment were delivered to the consignee on 25/2/1985. It was contended that the suit was not filed within three years from the date on which the consignment was damaged by fire or at least three years from 28/1/1985 on which day second respondent was informed about the destruction.

2. Learned Sub Judge on the evidence of PW1, Exts.A1 to A14 granted a decree directing appellants to pay Rs.15,784/- with interest and cost. Appellants challenged the judgment before the

District court, Thalassery in A.S.197/1992. Learned District Judge on re-appreciation of evidence confirmed the findings of learned Sub Judge and dismissed the appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> Whether the courts below were right in holding that Article 11 of Limitation Act applies, when Article 10 applies on the facts and circumstances of the case.

4. Learned counsel appearing for appellants heard. There was no representation for respondents.

5. Arguments of learned counsel is that in paragraph 3 of the plaint it was specifically admitted that second respondent consignor was informed by second appellant on 28/1/1985 that consignment was damaged due to accident while goods were being carried from Nagpur to Kanpur and in such circumstances suit should have been instituted at least three years from 28/1/1985 if not, from 3/1/1985 on which day the consignment was damaged and therefore suit should have been dismissed as barred by time. It was argued that in the plaint it was

admitted that out of 20 bags in the consignment, 10 bags were delivered and therefore it is only Article 10 of Limitation Act which is applicable to the facts of the case and not Article 11 as found by the courts below and therefore the decree granted by the courts below is not sustainable.

6. On the facts and evidence courts below found that though in paragraph 3 of the plaint it was pleaded by first respondent that second appellant informed second respondent on 28/1/1985 that out of the 20 bags of Supari, 15 bags of Supari were burned and damaged due to an accident while the goods were being carried from Nagpur to Kanpur, the letter by which the information was conveyed was not produced either by first respondent or the appellants. It was also found that no evidence was adduced to prove that there was in fact an accident or a fire while the consignment was being carried from Nagpur to Kanpur. Courts below also found that not even the first information report was produced to establish such an accident. Courts below also found that out of 20 bags of Supari entrusted with the appellants, only 10 bags were delivered and suit is

for the value of the remaining 10 bags, which were not delivered. Courts on such facts found that suit is not for the damages or loss caused but for non delivery of 10 bags of Supari not delivered to the consignee and therefore Article 11 applies.

7. Article 10 of the Limitation Act, 1963 applies to a case against a carrier for compensation for losing or injuring the goods. Period of limitation is three years and the period would start to run when the loss or injury occurs. Article 11 applies to a case against a carrier for compensation for non delivery or delay in delivering the goods. Period of limitation is three years. But the time would start to run, when the goods ought to be delivered. As found by the courts below, though it was one consignment of 20 bags of Supari, it could be taken as independent 20 bags. Out of the 20 bags, 10 bags were delivered on 25/2/1985. The suit is definitely for compensation for non delivery of the remaining 10 bags. If so, as rightly found by the courts below it is not a suit for loss or injury to the goods but for compensation for non delivery of 10 bags of Supari and the Article applicable is

Article 11 and not Article 10. If that be so, suit is to be instituted within three years, when the goods ought to be delivered. Out of the 20 bags, 10 bags were admittedly delivered on 25/2/1985. Therefore, courts below rightly took 25/2/1985 as the date on which 10 bags of Supari, which were not delivered, ought to have been delivered. As the suit was instituted within three years from the date, suit is within time. Learned counsel appearing for appellants submitted that while the first appeal was pending, as directed by the District Judge, the entire amount was deposited before the first appellate court.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.349 OF 1994

22nd November 2007

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